

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 1592 of 1992

For Approval and Signature:

Hon'ble MR.JUSTICE AKSHAY H.MEHTA

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO
 2. To be referred to the Reporter or not? : NO
 3. Whether Their Lordships wish to see the fair copy of the judgement? : NO
 4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO
 5. Whether it is to be circulated to the Civil Judge? : NO

A D WAGHELA

Versus

COMMISSIONER

Appearance:

1. Special Civil Application No. 1592 of 1992
MR JF SHAH for Petitioner No. 1
MR LR PUJARI, AGP for Respondent No. 1-2
-

CORAM : MR.JUSTICE AKSHAY H.MEHTA

Date of decision: 30/04/2002

CAV JUDGEMENT

1. The petitioner has approached this Court under Article 226-227 of the Constitution of India praying for

quashing and setting aside orders dated 16th February, 1991 and 18th February, 1992 passed by the respondents nos. 2 and 1 respectively, which orders are annexed to this petition as Annexure-D and Annexure-F. The petitioner's grievance is that despite justifying reasons the respondents have not regularized the period between 27th February, 1990 and 9th August, 1990 as leave due and admissible to the petitioner and have treated the said period as unauthorized absenteeism.

2. According to the petitioner, at the relevant time he was serving as Head Clerk-cum-Steward at Community Health Centre in Surendranagar district. His native place is at Nenpur in district Kheda, where his wife and other members of the family are residing. On 27th February, 1990 he left Muli to pay visit to his family at Nenpur. After reaching Nenpur he developed severe chest pain and also acute backache. He, therefore, got himself treated at Shri Indulal Yagnik Smarak Swasthya Kendra at Nenpur from 1st March, 1990. He was also supposed to report back on duty on that day but because of the compelling reasons he could not go to Muli and resume the service. Since this ailment continued for some time even after 1st March, 1990 the petitioner could not join the service. He, therefore, twice informed his superior officer at Muli about his ill health and the consequential treatment. According to the petitioner, as if this was not enough, his son also suffered from some strange disease which could not be diagnosed despite the petitioner consulting four medical experts of four different hospitals, namely (1) Vadtal Swaminarayan General Hospital, (2) Dr. Jayant Meckwan, M.S. of Anand, (3) Methodist Hospital at Nadiad and (4) Dr. Nilesh R. Jariwala of Mehmedabad. His son got ill on or around 15th May 1990. It was only after his son got recovered fully from the illness, he reported for duty at Muli on 10th August, 1990. After joining the service he submitted leave report on the very same day requesting his superior officer to treat the period between 1st March, 1990 and 9th August, 1990 as leave due and admissible to the petitioner. His immediate superior officer, namely the Superintendent of Community Health Centre at Muli addressed a communication dated October, 1990 to respondent no. 2 informing him that the petitioner had submitted application for grant of leave of 162 days for the period between 1st March 1990 and 9th August, 1990 in the prescribed form alongwith the medical certificate indicating his illness issued by Indulal Yagnik Smarak Health Centre, Nenpur and a fitness certificate issued by Dr. Jyotsanaben Oza. He has further stated in the letter that petitioner had also

stated about his son's illness in his application alongwith xerox copies of the medical certificates of the concerned hospitals. The Superintendent also opined that he had perused all the documents produced by the petitioner alongwith his application and had found the same to be genuine. He, therefore, in the said letter recommended to regularize the period in question and to treat it as leave due and admissible to the petitioner. Again on 19th February, 1991 the Superintendent, Community Health Centre, Muli wrote letter to respondent no. 2 stating that the petitioner had already submitted application for grant of leave for period between 1st March, 1990 and 9th August, 1990 and during respondent no. 2's visit at Muli the service book of the petitioner was handed over to him in person to enable him to decide the application. He, therefore, requested that respondent no. 2 may decide it and grant his application and return the service book of the petitioner at the earliest. He repeated his recommendation for grant of leave by stating the fact that from the date of resumption of service the petitioner had been regularly and punctually attending the office.

2.1. According to the petitioner, respondent no. 2, completely overlooking his and his son's medical record and recommendation made by the Superintendent, Community Health Centre, Muli, vide order dated 16th February, 1991 held that the petitioner having proceeded on leave on 27th February, 1989 without obtaining requisite prior permission was guilty of committing serious misconduct. He further held that despite having informed the petitioner telegraphically he did not report for duty and without handing over the charge proceeded on unauthorized leave. This was an act which could not be tolerated. He, therefore, directed that the period between 27th February, 1990 and 9th August, 1990 should be treated as unauthorized absenteeism and a note thereof to be entered into the service book of the petitioner.

2.2. According to the petitioner, he preferred appeal against the order passed by respondent no. 2 on 16th February, 1991 before the Commissioner, Health, Medical Service and Medical Education (Health Section), Gandhinagar i.e. respondent no. 1. Thereafter, the petitioner was personally called and heard. But according to him, he was heard by the Additional Director (Health) Dr. N.D. Ghasura and not by the 1st respondent. The petitioner's appeal came to be dismissed by order dated 18th February, 1992.

2.3. According to the petitioner, in the background of

these circumstances, he has approached this Court challenging the aforesaid orders passed by the respondents nos. 2 and 1 as they are detrimental to his interest.

3. Mr. J.F. Shah, learned counsel for the petitioner submitted that both the orders at Annexures D and F are required to be quashed and set aside as they are arbitrary, illegal and violative of principles of natural justice. Mr. Shah has submitted that though the order passed by the respondent no. 2 ostensibly looks innocuous and purely an administrative order, it entails certain civil consequences and, therefore, it was incumbent upon the respondent no. 2 to grant him opportunity of hearing before passing the impugned order. According to Mr. Shah, the non-regularization of the period in question as authorized leave will have three main adverse effects, firstly the entire period will be excluded while computing the petitioner's qualifying service for pension, secondly it will have effect of stoppage of increment with future effect and thirdly under rule 2 (c) (3) of Revised Leave Rules, 1935 (hereinafter referred to as 'the Rules') the unauthorized absence will have the effect of forfeiting past service for purpose of claiming leave. He has, therefore, submitted that the impugned order at Annexure-D will have detrimental financial implications as regards the petitioner. The second limb of his argument is that since the order in question has penal implication, respondent no. 2 has no authority or power to pass such order as his appointing authority is respondent no. 1 and he alone has the power to pass such order. Mr. Shah has lastly submitted that respondent no. 1 has not assigned any reason for dismissing the appeal as could be seen from Annexure-F that it is merely a four line order which does not contain any ground for rejecting the appeal. According to Mr. Shah, it being a non-speaking order, it is required to be quashed and set aside.

3.1. As against that, Mr. L.R. Pujari, Ld. AGP appearing for the respondents submitted that looking to the conduct of the petitioner, respondent no. 2 was quite justified in holding that the act of the petitioner proceeding on leave without permission was a grave misconduct for which he has been very leniently dealt with. He has further submitted that since the impugned order at Annexure-D was passed by the respondent no. 2 while exercising his administrative powers, there was no need for him to hear the petitioner before passing it and there is no violation of principles of natural justice. He has lastly submitted that the appellate authority has

taken into consideration the order passed by respondent no. 2, which assigns reasons for turning down the request of the petitioner and, therefore, there was no need on the part of the respondent no. 1 to give any reasons for dismissing petitioner's appeal. According to Mr. Pujari, this petition does not have any merit and it may be dismissed.

4. The petitioner in his petition has averred that after he reached Nenpur on 27th February, 1990, he developed serious chest pain and also backache, for which he was required to take treatment from Shri Indulal Yagnik Smarak Health Centre at Nenpur. He has further stated that his son also suffered from some unknown disease in the month of May 1990 onwards, for which he was treated by four different medical officers, details whereof have been referred to above. He has also stated that as soon as he and his son recovered from the illness he immediately returned to Muli and resumed the duty. On the very day of resumption of duty he submitted application to his superior officer, namely the Superintendent, Community Health Centre, Muli giving detailed reasons for his absence and also produced relevant medical record in support of the reasons. All these facts have been stated on oath by the petitioner. The respondents have not filed affidavit-in-reply in spite of the fact that the matter was admitted way back on 9th April, 1991. These facts, therefore, have remained uncontroverted. Not only that but the immediate superior officer of the petitioner, namely, the Superintendent, Community Health Centre, Muli, had examined the case of the petitioner in detail and in his opinion the reasons advanced by the petitioner were genuine and accordingly he made his strong recommendation to the respondent no. 2 to grant the application of the petitioner and treat the period in question as leave due and admissible to the petitioner. The Superintendent repeated his recommendation by writing a second letter dated 19th February, 1991, which is at Annexure-C to the petition. It clearly appears from the impugned order at Annexure-D that not even whisper has been made by the respondent no. 2 in his order that before passing order he had taken into consideration the medical record of the petitioner and his son and that he had called the petitioner and heard him personally. There is, therefore, nothing on record to show that what the petitioner stated was untrue or there was any manipulation. I am, therefore, inclined to believe that whatever the petitioner has stated regarding his and his son's illness is true and respondent no. 2 has not considered these facts while passing impugned order Annexure-D. It, therefore,

clearly appears that had respondent no. 2 given his anxious thought to the medical report, as has been done by the Superintendent, he would not have come to this conclusion. Unfortunately, he has totally ignored very relevant factor while deciding the petitioner's application for grant of leave.

4.1. As submitted by Mr. Shah the impugned order though apparently looks as purely administrative order, it has got far reaching implication, which will have adverse effect on the financial aspects as regards future increment and also pensionary benefits. In the impugned order though non-regularization of the period of absenteeism is not one of the penalties prescribed under the Gujarat Civil Service (Discipline and Appeal) Rules, 1971 (hereinafter referred to as 'the GCS Rules'), it has civil consequences in as much as it will have an effect of stoppage of increment of permanent nature and it will have adverse effect on the pensionary benefits, which may ultimately result into substantial financial loss to the petitioner. Rule 2 (c) (3) also prescribes that it shall in all cases have the effect of forfeiting past service for the purposes of claiming leave. Thus, looking to the effects which this order may have on the financial aspects of the petitioner's service, he ought to have been given an opportunity of hearing and deprivation of such opportunity could be termed as violation of principles of natural justice. For these reasons the impugned order at Annexure-D is required to be quashed and set aside.

4.2. Since the order of respondent no. 1 at Annexure-F is entirely based on order at Annexure-D passed by the respondent no. 2, as a consequential effect it will have to go. It can also be said that the respondent no. 1 was sitting in appeal by virtue of statutory power conferred on him by GCS Rules and he was, therefore, required to assign some reasons, if not detailed reasons for turning down the appeal. Unfortunately he has not done so and has dismissed the appeal by a non-speaking order. On that ground also order at Annexure-F is required to be quashed and set aside.

4.3. Since the petitioner's request for quashing and setting aside orders at Annexures D and F is being accepted on aforesaid grounds, there is no need for me to deal with the contention raised by Mr. Shah that since it is a penal order, respondent no. 2 has no power or authority to pass that order as he is not the appointing authority of the petitioner.

5. In light of the aforesaid discussion, the orders at Annexures D and F are quashed and set aside. The respondents are directed to regularize absence of the petitioner from 27th February, 1990 to 9th August, 1990, both days inclusive, as leave due and admissible to the petitioner. This may be done on or before 31st May, 2002. This petition is, therefore, allowed. Rule made absolute with no order as to costs.

[AKSHAY H. MEHTA, J.]

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